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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

) Div. 6

) **MOTION TO PRECLUDE THE**
) **STATE'S COMPUTER**
) **FORENSIC EXPERTS AND**
) **REPORTS**

) **(Oral Argument Requested)**

22 **MOTION**

23 Steven DeMocker, by and through counsel, hereby respectfully requests that the
24 Court preclude the State from offering its computer forensic experts and reports based
25 on its failure to disclose EnCase Case files, failure to timely initiate and complete
26 review of the electronic forensic data, and failure to timely disclose results of its
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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 FEB 25 PM 4:38

CLERK OF COURT ✓

BY: B. Hamilton

1 forensic examinations in advance of trial. This motion is based on the due process
2 clause, the Confrontation Clause, the Eighth Amendment and Arizona counterparts,
3 Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the following
4 Memorandum of Points and Authorities.
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6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 The State inexplicably failed to even begin its review of the electronic evidence
8 in this case until months after the evidence was seized. As a result of the State's delay,
9 the evidence has not been analyzed. With less than three months to trial in a death
10 penalty case, the State still has no idea when its analysis will be complete. As a result,
11 Mr. DeMocker has not received the State's disclosure with respect to the volumes of
12 computer forensic evidence. This includes at least four hard drives as well as multiple
13 other CDs, DVDs, iPods, cameras, and flash drives. Mr. DeMocker has a right to
14 review and respond to the State's analysis of the computer forensic evidence against
15 him. The State also ignored and then obstructed Mr. DeMocker's receipt of EnCase
16 Case files, the data necessary to review its as of yet incomplete forensic analysis. The
17 State's conduct has interfered with Mr. DeMocker's ability to confront the evidence
18 against him and to prepare his defense. This evidence should be excluded from trial.
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20 **1. History of Electronic Evidence**

21 CDs, DVDs, flash drives, and hard drives were seized from Mr. DeMocker and
22 Ms. Kennedy's residence in July of 2008. During testimony on February 19, 2010, the
23 State disclosed that it did not begin examining these items until November, over four
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1 months after they were originally seized. During this same testimony, the State also
2 revealed that although James Knapp's computer was seized in January of 2009 DPS did
3 not begin examination of this computer until ten months later, in October, 2009. It was
4 also revealed in testimony at the same hearing from Sgt. Randy Arthur and Det. Steve
5 Page that the State has not completed its examination of any of the four main computers
6 or the other CDs, DVDs, and flash drives. The State has no estimate as to when its
7 examination will be complete.
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10 On January 13, 2010, defense counsel wrote to Mr. Butner requesting EnCase
11 Case Files and EnCase Log Files for all electronic storage media. No response has been
12 received. At a hearing on this matter on February 19, Sgt. Arthur testified that there is
13 no such thing as an EnCase Case file. Sgt. Arthur's C.V. indicates he has completed an
14 EnCase Advanced Training in 2009 and he testified that he is the head of the Arizona
15 DPS Computer Forensics Lab. The EnCase Manual's Glossary of Terms provides that
16 an EnCase Case file is a "text file containing information specific to one case" that
17 "includes pointers to one or more evidence files, devices, bookmarks, search results,
18 sorts, hash analysis results and signature analysis." The Manual also provides that "you
19 must create a case file before you can preview any media or analyze evidence files."
20 The EnCase Certified Examiner Study Guide provides that the Case File "represents all
21 your work in a case, so maintaining its integrity is important." A portion of the EnCase
22 Manual is attached to this motion. We will hand deliver a CD of the entire manual on
23 Tuesday, March 3, 2010.
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2 **2. Prejudice from State's Conduct**

3 The State's delay in examining these items and in completing its review has
4 virtually guaranteed that Mr. DeMocker and his defense will not be able to review and
5 analyze the State's evidence and reports. Mr. DeMocker has a right not only to perform
6 an independent analysis of the forensic information seized by the State, but to
7 independently examine the State's analysis and conclusions. Given the State's delay in
8 examining this evidence, with less than three months to trial, Mr. DeMocker is entirely
9 unable to exercise his rights to test the State's evidence. This is an interference with his
10 right to confront the evidence against him. The Confrontation Clause's primary goal is
11 to,

12 “ensure reliability of evidence, but it is a procedural rather than a substantive
13 guarantee. It commands, not that evidence be reliable, but that reliability be
14 assessed in a particular manner: by testing in the crucible of cross-examination.”

15 *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

16 Thus, the Confrontation Clause applies not only in-court but also out-of court
17 because integral to the right to confront is the right to prepare for that confrontation:

18 [W]hile a restriction on pretrial discovery might not suggest as direct a violation
19 on the confrontation right as would a restriction on the scope of cross-
20 examination at trial, the former [is] not free from confrontation concerns.

21 *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985). Moreover, the,

22 “right of cross-examination also may be significantly infringed by events
23 occurring outside the trial itself, such as the wholesale denial of access to
24 material that would serve as the basis for a significant line of inquiry at trial.”

1 *Pennsylvania v. Ritchie*, 480 U.S. 39, 66, 107 S.Ct. 989, 1006 n.2 (1987) (plurality)
2 (Stevens, J. dissenting).

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4 As *Crawford* reiterated, limiting a defendant's access to pretrial preparation
5 violates the Confrontation Clause:

6 [R]estriction on the ability to engage in cross-examination does not suggest,
7 however, that the Confrontation Clause prohibits only such limitations. A crucial
8 avenue of cross-examination also may be foreclosed by the denial of access to
material that would serve as the basis for this examination.

9 *Id.* 480 U.S. at 67, 107 S.Ct. at 1006.

10 The State's refusal to disclose critical EnCase Case files that have been in their
11 possession for months has also interfered with the Defense's ability to prepare a
12 defense, conduct an independent examination and subject the State's evidence to
13 examination and analysis. The defense has not been provided with any EnCase case
14 files in this case. Either Sgt. Arthur, the head of the Arizona DPS Computer Forensics
15 Lab, is not familiar enough with the EnCase software to discuss basic terms from the
16 EnCase Manual or he provided incorrect information to the Court. In either case, the
17 failure of the State to provide this information to the defense is yet another direct
18 interference with the defense's ability to conduct a review of the State's forensic
19 analysis thus far and confront the evidence against Mr. DeMocker.
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23 The State proposes to offer this evidence as proof of Mr. DeMocker's motive and
24 as evidence of aggravation. Given the importance of this evidence and the State's lack
25 of diligence in examining the evidence, completing the examination, providing the
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disclosure to the defense, responding to the request for EnCase files and accurately testifying about the status of the State's disclosure, this evidence should be excluded.

The United States Constitution requires that "extraordinary measures [be taken] to insure that the [Accused] is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 352 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)). See also *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.") (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). This elevated level of due process applies both to the guilt and penalty phases of the case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

CONCLUSION

Defendant Steven DeMocker, by and through counsel, hereby requests that this Court prohibit the State from offering testimony from any of the State's computer forensic experts and of the results of any computer forensic examinations.

1 DATED this 25th day of February, 2010.

2
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4 By: 

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6
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12 Attorneys for Defendant

13 **ORIGINAL** of the foregoing hand delivered for
14 filing this 25th day of February, 2010, with:

15 Jeanne Hicks
16 Clerk of the Court
17 Yavapai County Superior Court
18 120 S. Cortez
19 Prescott, AZ 86303

20 **COPIES** of the foregoing hand delivered this
21 this 25th day of February, 2010, to:

22 The Hon. Thomas B. Lindberg
23 Judge of the Superior Court
24 Division Six
25 120 S. Cortez
26 Prescott, AZ 86303

27 Joseph C. Butner, Esq.
28 Prescott Courthouse basket


2983133

From the EnCase Manual

From the EnCase manual, Glossary of Terms:

Case File - A text file containing information specific to one case. The file includes pointers to one or more evidence files, devices, bookmarks, search results, sorts, hash analysis results, and signature analysis.

Case File Background

An EnCase evidence case has a tripartite structure consisting of an evidence file, a case file, and EnCase® program configuration files.

The case file contains information specific to one case. It contains:

- Pointers to one or more evidence files or previewed devices
- Bookmarks
- Search results
- Sorts
- Hash analysis results
- Signature analysis reports
- The ranges of encrypted sectors on the hard drive
- The original MBR (Master Boot Record, a critical portion of the subject hard drive)

Note: You must create a case file before you can preview any media or analyze evidence files.

Case File Backup

By default, a backup copy of the case file is automatically saved by EnCase every 10 minutes, and by default, backup files (.cbak) are saved to C:\Program Files\EnCase\Backup. With the exception of the file extension, this file has the same name as the parent case file. The save interval can be changed through the Tools menu -- Select Tools > Options > Global, and change the number in the Auto Save text field. Selecting 0 disables the autosave function. This is not recommended.

Bookmarks Overview

EnCase allows files, folders, or sections of a file, to be marked and saved for reference. These are called bookmarks. Bookmarks are stored in their associated case file and can be viewed by selecting the Bookmarks tab. You can bookmark any existing data or folder.

From the EnCase Certified Examiner (ENCE) Study Guide

A case file is created when you first save your case.

It is at that time that you choose and name your storage path location.

The case file is a plain text file, mostly in Unicode, that contains pointers to the evidence file and case-specific information.

As the evidence file itself never changes, all search hits, book-marks, notes, sorts, has analysis, file verification information, and so forth must exist in the form of data in the case file with pointers to the evidence file.

When you recover a partition [in the event of a formatted disk partition or an Fdisked hard drive] , there is no partition inserted into the original evidence file. Rather, the partition is virtually reconstructed with data and pointers in the case file.

With time and analysis work, these case files can get quite large and can take some time to load. This file represents all your work in a case, so maintaining its integrity is important.

You should frequently save your work by clicking Save as you complete a process or are about to start another step of the analysis. It only takes on unexpected crash and the loss of significant work to make this habit second nature.

Backing up the case file is also an important function. EnCase does a backup automatically, but it is important to back up the case file at various points in your case, preferably daily. If a case file develops a problem, the backup can also be corrupted. Keeping daily backups of your case file in appropriately named folders gives you the XP equivalent of "restore points."